WESTCOURT CORPORATION SDN BHD

lwn.

TRIBUNAL TUNTUTAN PEMBELI RUMAH

MAHKAMAH PERSEKUTUAN, PUTRAJAYA
AHMAD FAIRUZ KHN
PAJAN SINGH GILL HMP
AUGUSTINE PAUL HMR
[RAYUAN SIVIL NO: 01-11-2004 (W)]
6 SEPTEMBER 2004

PROSEDUR SIVIL: *Bidang Kuasa - Tribunal Tuntutan Pembeli Rumah - Objek penubuhan - Berkuatkuasa pada 1 Disember 2002 - Sama ada berbidang kuasa mendengar tuntutan yang berbangkit dari kemungkiran kontrak yang berlaku sebelum 1 Disember 2002 - Akta Pemaju Perumahan (Kawalan dan Pelesenan) (Pindaan) 2002, ss. 16AD, 16M, 16N, 16N(2) & (3), 16O(1), 32(2) - Perlembagaan Persekutuan fasal 7*

PENTAFSIRAN STATUT: *Kesan kebelakangan - Akta Pindaan - Sama ada statut berkaitan prosedur - Sama ada menyentuh hak-hak substantif - Sama ada beroperasi secara kebelakangan - Tribunal Tuntutan Pembeli Rumah - Bidang kuasa - Sama ada boleh mendengar tuntutan yang berbangkit dari kemungkiran kontrak yang berlaku sebelum tarikh kuatkuasanya - Tarikh perjanjian - Sama ada tidak material kepada bidang kuasa Tribunal - Akta Pemaju Perumahan (Kawalan dan Pelesenan) (Pindaan) 2002 ss. 16AD, 16M, 16N, 16N(2) & (3), 16O(1), 32(2) - Perlembagaan Persekutuan fasal 7*

Ini adalah rayuan terhadap penghakiman Mahkamah Rayuan kerana mengakas Mahkamah Tinggi dan membenarkan rayuan Tribunal Tuntutan Pembeli Rumah ('Tribunal'), atas alasan bahawa Mahkamah Tinggi telah silap apabila memutuskan bahawa Tribunal, yang ditubuhkan di bawah Akta Pemaju Perumahan (Kawalan dan Pelesenan) (Pindaan) 2002 ('Akta Pindaan') berkuatkuasa pada 1 Disember 2002 untuk mendengar tuntutan oleh pembeli rumah terhadap pemaju perumahan berlesen, tidak berbidang kuasa untuk mendengar tuntutan jika perjanjian jualbeli dimasuki sebelum tarikh 1 Disember 2002.

Fakta menunjukkan bahawa Akta Pindaan, melalui s. 16ADnya, telah mengenakan penalti jenayah bagi ketidakpatuhan terhadap award yang dibuat oleh Tribunal. Selain itu, Mahkamah Tinggi, dalam keputusannya, telah mengambil pandangan, bahawa: (i) oleh kerana kemungkiran-kemungkiran perjanjian jualbeli dalam kes ini berlaku sebelum penubuhan Tribunal, dan

Parlimen pula tidak dengan nyata memberi kesan kebelakangan kepada Akta Pindaan, maka Tribunal adalah tidak berbidang kuasa untuk mendengar tuntutan pembeli rumah yang berkenaan itu; dan (ii) mengambilkira s. 16AD, memberi award kepada pembeli rumah bererti membenar undang-undang jenayah beroperasi secara kebelakangan. Rumusan-rumusan ini, bagaimanapun, telah ditolak oleh Mahkamah Rayuan yang menyatakan: (i) walaupun bidang kuasa am Tribunal dipaparkan oleh s. 16M Akta Pindaan, peruntukan sebenar yang menentukan sempadan bidang kuasa Tribunal adalah s. 16N, terutama s. 16N(2)nya; (ii) mentafsir s. 16N(2) secara liberal dan berdasarkan tujuan, apa yang perlu dipastikan oleh Tribunal bagi membolehkannya mendengar tuntutan hanyalah, pertama, bahawa tuntutan diasaskan kepada satu kausa tindakan yang berbangkit dari perjanjian jualbeli yang dimasuki di antara pembeli rumah dan pemaju perumahan, dan kedua, bahawa tuntutan dibawa tidak lebih dari 12 bulan dari tarikh pengeluaran sijil layak duduk atau dari tarikh lupusnya tempoh tanggungan kecacatan; (iii) adalah perlu untuk membezakan di antara kemungkiran perjanjian jualbeli dan award yang diberi akibat dari kemungkiran tersebut; dan (iv) oleh kerana s. 16AD hanya menjadikan kegagalan mematuhi award Tribunal (dan tidak kemungkiran perjanjian jualbeli) sebagai kesalahan, maka, memberi award kepada pembeli rumah ekoran kemungkiran perjanjian jualbeli tidak boleh dikata sebagai membenar undang-undang jenayah beroperasi secara kebelakangan.

Di Mahkamah Persekutuan, perayu mengulangi hujah-hujahnya dibawah, termasuk bahawa membenarkan Tribunal mendengar tuntutan pembeli rumah di sini akan menjejaskan hak-hak substantifnya, dan bahawa menguatkuasakan undang-undang jenayah secara kebelakangan adalah dilarang oleh fasal 7 Perlembagaan Persekutuan. Isunya adalah sama ada Tribunal mempunyai bidang kuasa mendengar tuntutan yang timbul daripada perjanjian jualbeli yang dimasuki sebelum tarikh Akta Pindaan berkuatkuasa.

Diputuskan (menolak rayuan)
Oleh Ahmad Fairuz KHN menyampaikan penghakiman mahkamah:

[1] Tribunal mempunyai bidang kuasa untuk mendengar tuntutan yang timbul daripada perjanjian yang dimasuki sebelum 1 Disember 2002 dan s. 16AD adalah terpakai kepada perjanjian yang dimasuki sebelum tarikh itu. (ms 219 e)

[2] Mahkamah bersetuju dengan Mahkamah Rayuan bahawa bidang kuasa Tribunal adalah sebagaimana diperuntukkan oleh s. 16N(2) Akta Pindaan. Peruntukan seksyen tersebut, serta ss. 16N(3) dan 160(1) Akta Pindaan,

menunjukkan bahawa bidang kuasa Tribunal ditetapkan secara longgar. Ini menunjukkan hasrat Parlimen untuk menyediakan suatu forum yang mudah bagi pembeli-pembeli rumah membuat tuntutan. (ms 213 b-h)

[2a] Mahkamah juga bersetuju bahawa mengikut s. 16(N)(2), asalkan tuntutan di hadapan Tribunal itu melibatkan perjanjian jualbeli di antara pembeli dan pemaju perumahan berlesen dan tuntutan dibuat dalam masa tidak melebihi 12 bulan daripada tarikh pengeluaran sijil penghunian atau tarikh luput tempoh liabiliti kecacatan seperti yang dinyatakan dalam perjanjian jualbeli, maka Tribunal mempunyai bidang kuasa untuk mendengar tuntutan tersebut tanpa mengira tarikh perjanjian. Tafsiran ini diperkuat oleh s. 16N(3) Akta Pindaan. (ms 217 c-d)

[3] Penubuhan Tribunal telah mencipta suatu forum baru bertujuan untuk mempercepatkan penyelesaian pada kos yang minima sesuatu tuntutan oleh pembeli rumah terhadap pemaju perumahan berlesen yang tidak melebihi RM25,000 kerana pelanggaran perjanjian jualbeli yang dimasuki oleh mereka. Oleh itu tidak ada hak mana-mana pihak yang telah dihakis atau disingkirkan. (ms 211 c-d)

[4] Bahawa pemilihan forum adalah satu perkara prosedur dan bukan substantif dan bahawa, dalam kebanyakan kes, sesuatu Akta baru akan mempunyai kesan retrospektif selagi ia melibatkan pemilihan forum adalah sesuatu yang sudah lama diterima. Dalam kes ini, Akta Pindaan memperuntukkan perubahan forum daripada Mahkamah kepada Tribunal. Ini adalah perkara berkaitan prosedur dan bukannya substantif. Ia dengan itu berkuatkuasa kebelakangan. (ms 217 f-h)

[5] Kemungkiran perjanjian bukanlah suatu kesalahan jenayah di bawah s. 16AD. Yang menjadi kesalahan jenayah ialah ketidakpatuhan kepada award tribunal dan ianya tidak, dalam apa-apa keadaan pun, boleh berkuatkuasa kebelakangan kerana Tribunal hanya dapat memberi award selepas 1 Disember 2002. Seksyen 16AD adalah berkuatkuasa secara prospektif, tidak melanggari fasal 7 Perlembagaan Persekutuan dan adalah tidak relevan kepada bidang kuasa Tribunal. (ms 219 c-d)

*[**English** Translation Of Headnotes*

This was an appeal against the judgment of the Court of Appeal allowing the appeal of the Homebuyer Claims Tribunal ('Tribunal') and overruling the High Court, on the ground that the High Court was wrong in holding that the Tribunal, which was constituted under the Housing Developers (Control and Licensing) (Amendment) Act, 2002 ('Amendment Act') with effect from 1 December 2002 to hear claims by homebuyers against licensed housing developers, had no jurisdiction to hear the claim where the sale and purchase agreement was entered into before 1 December 2002.

The facts showed that the Amendment Act, by its s. 16AD thereof, had imposed a criminal penalty for any non-compliance with the award made by the Tribunal. It was also evident that the High Court, vide its judgment, had endeared to the view that: (i) the Tribunal could not have the jurisdiction to hear the homebuyer's claim, since the breaches of the sale and purchase agreement in this case occurred before 1 December 2002 and since Parliament had not made it clear that the Amendment Act would have retrospective effect; and (ii) considering s. 16AD, granting an award to the homebuyer would tantamount to allowing criminal law to operate retrospectively. These findings were however dismissed by the Court of Appeal on the grounds, inter alia, that: (i) while s. 16M sets out the general jurisdiction of the Tribunal, it is s. 16N and in particular s. 16N(2) that provides the perimeter of the Tribunal's jurisdiction; (ii) upon a liberal and purposive approach of s. 16N(2), the Tribunal, in order to assume jurisdiction to hear the claim, needs only verify, firstly, that the claim was based on a cause of action arising from a sale and purchase agreement entered into between the homebuyer and the housing developer, and secondly, that it was brought by the homebuyer not later than 12 months from the date of issuance of the certificate of fitness for occupation or the expiry date of the defects liability period; (iii) a distinction needs be drawn between a breach of the sale and purchase agreement and an award rendered arising from such breach; and (iv) since what was criminalized by s. 16AD was the failure to satisfy the Tribunal's award (and not the breach of the sale and purchase agreement), granting an award to the homebuyer pursuant to a breach of the sale and purchase agreement here could not tantamount to allowing criminal law to operate retrospectively.

Before the Federal Court, the appellant reiterated its arguments below, including that to allow the Tribunal to hear the homebuyer's claim would prejudice its substantive rights, and that enforcing criminal law retrospectively would run foul of art. 7 of the Federal Constitution. The issue was whether the Tribunal had jurisdiction to hear claims that arose from sale and purchase agreements entered into before the coming into force of the Amendment Act.

Held (dismissing the appeal)
Per Ahmad Fairuz CJ delivering the judgment of the court:

[1] The Tribunal has jurisdiction to hear a claim that arose from an agreement that was entered into before 1 December 2002 and s. 16AD is also applicable to an agreement entered into before that date.

[2] The court would concur with the Court of Appeal that the jurisdiction of the Tribunal is as provided in s. 16N(2) of the Amendment Act. The provision of the section, and of ss. 16N(3) and 160(1) thereof, show that the Tribunal's jurisdiction is loosely prescribed. This reflects Parliament's intention to provide a simple forum for homebuyers to file their claim.

[2a] The court would further agree that, under s. 16N(2), so long as the claim before the Tribunal concerned a sale and purchase agreement between a homebuyer and a licensed housing developer, and was brought by the homebuyer not later than twelve months from the date of issuance of the certificate of fitness for occupation or the expiry date of the defects liability period, the Tribunal would have jurisdiction to hear the claim irrespective of the date of the agreement. This interpretation finds support in s. 16N(3) of the Amendment Act.

[3] The establishment of the Tribunal is a creation of another forum intended for speedy disposal at a minimum cost of a prescribed claim up to the limit of RM25,000 by a homebuyer against a licensed housing developer for breach of a sale and purchase agreement entered into between the parties. There is therefore no right of anyone being eroded or removed.

[4] That the choice of forum is a matter of procedure and not a matter of substantive right, and that in most cases a new Act would have a retrospective effect so far as the choice of forum is concerned is well settled. In this case, the Amendment Act provides for a change of forum from the Court to the Tribunal. This relates to the realm of procedure and not a matter of substantive right. It therefore operates retrospectively.

[5] Breach of agreement was not an offence under s. 16AD. What was an offence was non-compliance with the Tribunal's award which, under any circumstance, could not operate retrospectively since the Tribunal could only give the award after 1 December 2002. It follows that s. 16AD operates prospectively, is not in breach of art. 7 of the Federal Constitution and is not relevant to the Tribunal's jurisdiction.]

Kes-kes yang dirujuk:
Chebaro v. Chebaro [1986] 2 All ER 897 ***(diikuti)***
Hager v. Osborne [1992] Fam 94 ***(diikuti)***
Lim Phin Khian v. Kho Su Ming [1996] 1 CLJ 529 FC ***(dirujuk)***
New India Insurance Co Ltd v. Shanti Misra AIR [1976] SC 237 ***(diikuti)***
Ramzan Darzi & Ors v. Mst Azizi & Ors [1976] Cri. LJ 897 ***(diikuti)***
Sim Seoh Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd [1995] 1 CLJ 491 CA ***(dirujuk)***

Perundangan yang dirujuk:
Housing Developers (Control and Licensing) (Amendment) Act 2002, ss. 16AD, 16M, 16N(2), 16N(3), 16O(1), 22C, 32(2)

Affiliation Proceedings Act 1957 [Eng], s. 2
Guardianship of Minors Act 1971 [Eng], s. 11B
Matrimonial and Family Proceedings Act 1984 [Eng], s. 12

Bagi pihak perayu - Lambert Rasa Ratnam (Sia Yeow)
Bagi pihak responden - Abd Gani Patail A-G (Azahar Mohamed, Umi Kalsom Abd Majid, Mastura Ayob & Norina Bahadon)

[Rayuan dari Mahkamah Rayuan; Rayuan Sivil No: W-01-55-2003]

Dilaporkan oleh WA Sharif

PENGHAKIMAN

Ahmad Fairuz KHN:
Pada 14 Jun 2004, mahkamah ini telah mendengar rayuan perayu di atas soalan berikut:

> whether the Tribunal has jurisdiction to hear and adjudicate on cases where the sale and purchase agreement was entered into before 1 December 2002 and, if so to what extent.

Di akhir pendengaran rayuan, mahkamah ini telah menolak rayuan perayu dan berikut adalah alasan-alasan bagi keputusan tersebut.

Tribunal Tuntutan Pembeli Rumah (selepas ini disebut tribunal) telah ditubuhkan melalui Akta Pemaju Perumahan (Kawalan dan Pelesenan) (Pindaan) 2002 (Akta Pindaan) yang berkuatkuasa pada 1 Disember 2002. Tujuan penubuhan ini adalah untuk membolehkan tribunal mendengar tuntutan oleh pembeli rumah terhadap pemaju perumahan. Sebelum Akta Pindaan ini berkuatkuasa, seseorang pembeli rumah boleh menuntut gantirugi terhadap pemaju perumahan melalui tindakan di Mahkamah Sivil.

Pada 27 Mac 2003, tribunal di dalam Tuntutan No. TTPR/B/0057/03 telah membuat penghakiman bahawa perayu dikehendaki membayar kepada Tan Geok Moi sebanyak RM13,926.74. Pada 5 Mei 2003 Mahkamah Tinggi Kuala Lumpur telah memberi kebenaran kepada perayu untuk memulakan prosiding semakan kehakiman (judicial review) untuk suatu perintah *certiorari* bagi membatalkan penghakiman itu dan untuk suatu pengisytiharan bahawa tribunal tidak mempunyai bidang kuasa untuk mendengar tuntutan di mana perjanjian jualbeli dimasuki sebelum 1 Disember 2002. Pada 4 September 2003 Mahkamah Tinggi memutuskan bahawa tribunal tidak mempunyai bidang kuasa untuk mendengar tuntutan-tuntutan itu dan memberikan perintah-perintah seperti yang dipohon. Jika Parlimen, mengikut mahkamah itu, berhasrat memberikan tribunal bidang kuasa kebelakangan untuk meliputi perjanjian jualbeli yang dimasuki sebelum berkuatkuasanya Akta Pindaan tersebut, maka Parlimen akan mengatakan sedemikian dengan perkataan-perkataan yang jelas sepertimana dinyatakan di dalam s. 32(2) Akta Pindaan yang berbunyi "Every agreement, assignment or charge lawfully entered into between a purchaser and his financier before the appointed date shall be subject to, and the parties thereto shall be entitled to the benefits of, the new s. 22C of the principal Act". YA Hakim Mahkamah Tinggi selanjutnya menekankan bahawa di bawah s. 16AD hanya ketidakpatuhan kepada sesuatu award tribunal dan bukannya kemungkiran syarat perjanjian itu sendiri yang akan membawa kepada liabiliti jenayah. Sungguhpun demikian award tersebut adalah, mengikut YA, berlanjutan daripada kemungkiran perjanjian jualbeli. Oleh kerana kemungkiran-kemungkiran dalam permohonan-permohonan di hadapannya berlaku sebelum penubuhan tribunal, dan oleh kerana Parlimen tidak memperuntukkan dengan nyata bahawa pindaan-pindaan itu mempunyai kesan kebelakangan, maka YA berpendapat bahawa tribunal tidak mempunyai bidang kuasa untuk mendengar tuntutan-tuntutan yang terbit daripada perjanjian jualbeli yang dimasuki sebelum 1 Disember 2002.

Terhadap keputusan Mahkamah Tinggi itu, tribunal merayu kepada Mahkamah Rayuan. YA Richard Malanjum HMR di dalam penghakimannya berkata:

> Applying the liberal and purposive approach to the statutory provisions that deal with the jurisdiction of the Tribunal we find that the argument advanced for the Respondents is premised on at least two assumptions. Firstly, that the date in a sale and purchase agreement is material in determining the jurisdiction of the Tribunal. Secondly, any award given for a breach of a sale and purchase agreement entered into prior to the appointed date, particularly where the breach was before that date, would tantamount to allowing criminal law to operate retrospectively since it is now punishable being an offence for any failure to comply with or satisfy such award. This argument of course relates to the legal principle that criminal law cannot be made to operate retrospectively unless specifically stipulated.

With respect, we find the first assumption to be without basis. There is nothing in the provisions establishing the Tribunal or related thereto which can be said to support it. In our view while section 16M sets out the general jurisdiction of the Tribunal, it is section 16N and in particular subsection 16N(2) thereof that provides the perimeter of the jurisdiction of the Tribunal.

Mengenai s. 16N(2) itu, YA Hakim Mahkamah Rayuan juga berkata:

Sub-section 16N(2) does not stipulate a cut off point by reference to date of agreement *vis-a-vis* jurisdiction. All that is required of the Tribunal in assuming jurisdiction to hear a claim presented before it is to verify whether it is within the ambit of subsection 16N(2) that is to say:

(a) whether the claim is based 'on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer; and

(b) whether the claim is 'brought by a homebuyer not later than twelve months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the sale and purchase agreement.'

We do not think there should be any additional or prerequisite term to be read into the provisions. To do so would tantamount to adding what is not in the statute. And that should not be done since Judges are not legislators.

YA HMR itu seterusnya berkata:

In fact the need for a sale and purchase agreement as a condition precedent in filing a claim has also been waived by subsection 16N(3) ...

Mengenai s. 16AD, YA Hakim Mahkamah Rayuan itu memutuskan:

We are conscious of the counter-argument that without a breach in the first place there is no question of an award being given by the Tribunal and without an award there is no issue of penalty arising. And if a breach occurred before the appointed date that would effectively be criminalizing an act retrospectively.

With respect, a distinction should be drawn between a breach of the sale and purchase agreement and an award rendered arising from such breach. As we have stated earlier on it is not the breach of the sale and purchase agreement that has been criminalized. Rather it is the failure to comply with or satisfy any award given by the Tribunal in connection with any claim made pursuant to such breach. At any rate section 16AD does not empower the Tribunal to impose any penalty. It only provides for a defaulter to be subject to prosecution which invariably is the task of another authority in a separate criminal proceeding. And on being prosecuted a defaulter is at liberty to raise in defence

the inapplicability of the section to him. Such approach was successful in the case of *Energoprojek (M) Holdings v. Public Prosecutor* [1998] 5 MLJ 401. Accordingly, we do not think section 16AD is intended to take away any substantive right of any person. Neither is it meant to affect or limit the jurisdiction of the Tribunal in any manner howsoever.

Berkenaan hujah perayu bahawa jika tribunal dibenarkan mendengar tuntutan yang berasaskan perjanjian jualbeli yang dimasuki sebelum tarikh 1 Disember 2002, ia akan menjejas dan memprejudis hak-hak substantif responden, YA HMR itu berkata:

It is to be noted that the establishment of the Tribunal is in effect a creation of another forum intended for speedy disposal at a minimum cost of a prescribed claim up to the limit of RM25,000.00 by a homebuyer against a licensed housing developer for breach of a sale and purchase agreement entered into between the parties. There is therefore no question of the rights of anyone being eroded or removed as was envisaged in *The Colonial Sugar Refining Company, Limited v. Irving* [1905] AC 369 (PC). (See also: *Lim Phin Khian v. Kho Su Ming* [1996] 1 MLJ 1).

And although it may be argued that the imposition of penalty has a prejudicial effect, such preposition may be true if it is the breach of the sale and purchase agreement that has been criminalized. But here it is not the case.

Lantas, rayuan perayu ditolak oleh Mahkamah Rayuan.

Di mahkamah ini, Encik Lambert Rasa-Ratnam bagi pihak perayu telah juga berhujah bahawa tribunal tidak mempunyai bidang kuasa untuk mendengar tuntutan berkaitan perjanjian jualbeli yang dimasuki sebelum 1 Disember 2002. Untuk menyokong hujahnya, Encik Lambert Rasa-Ratnam merujuk kepada ungkapan penghakiman mahkamah ini di dalam kes *Lim Phin Khian v. Kho Su Ming* [1996] 1 CLJ 529 yang berbunyi:

The presumption against retrospectivity of legislation is based upon the judicial philosophy that Parliament does not intend an unjust result. See P*esuruhjaya Ibu Kota Kuala Lumpur v. Public Trustee & Ors* [1971] 2 MLJ 30 at 31. That this approach is still current appears from two recent decisions of the House of Lords. The first of these is *'The Boucraa'* [1994] 1 All ER 20 at pp 29-30 where Lord Mustill said:

My Lords, it would be impossible now to doubt that the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect. Nor indeed would I wish to cast any doubt on the validity of this approach for it ensures that the courts are constantly on the alert for the kind of unfairness which is found in, for example, the characterization of past conduct which was lawful when it took place, or on alterations to the antecedent natural, civil or familiar status ...

Encik Lambert Rasa-Ratnam juga merujuk kepada kes *Sim Seoh Beng @ Sim Sai Beng & Anor v. Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 CLJ 491 di mana Mahkamah Rayuan berkata:

> In our judgment, the correct test to be applied to determine whether a written law is prospective or retrospective is to first ascertain whether it would affect substantive rights if applied retrospectively. If it would, then, *prima facie* that law must be construed as having prospective effect only, unless there is a clear indication in the enactment that it is in any event to have retrospectivity.

Encik Lambert Rasa-Ratnam menegaskan bahawa pindaan itu bukan hanya berkaitan dengan forum tetapi melibatkan juga hak-hak substantif perayu di mana dengan kemasukan s. 16AD, obligasi perayu di sisi undang-undang telah berubah sifat. Ini kerana s. 16AD mengenakan penalti jenayah bagi ketidakpatuhan kepada award yang dibuat oleh tribunal dan penalti itu tidak dikenakan terhadap perayu sebelum Akta Pindaan itu berkuatkuasa. Encik Lambert Rasa-Ratnam merujuk kepada *Craies on Statute Law* (6th edn) di mana di ms 386 penulis mentakrifkan undang-undang kebelakangan seperti berikut:

> which takes away or impairs any vested right acquired under existing laws or creates a new obligation, or imposes a new duty; or attaches a new disability in respect to transactions or considerations already past.

Encik Lambert Rasa-Ratnam berhujah bahawa pihak-pihak, ketika memasuki perjanjian jualbeli, tidak menjangkakan kemungkiran perjanjian itu akan mengakibatkan kesalahan jenayah. Jika tribunal diberi bidang kuasa ke atas perjanjian sebelum 1 Disember 2002, ini bermakna undang-undang jenayah akan berkuatkuasa kebelakangan sedangkan ini di larang oleh Perkara 7 Perlembagaan Persekutuan. Justeru itu Encik Lambert Rasa-Ratnam berhujah bahawa jika mahkamah ini memutuskan bahawa tribunal mempunyai bidang kuasa ke atas perjanjian jualbeli yang dimasuki sebelum 1 Disember 2002, beliau menggesa mahkamah menghadkan pemakaian s. 16AD hanya kepada perjanjian yang dimasuki selepas tarikh tersebut.

Di dalam hujahan balasnya, Peguam Negara bagi pihak responden merujuk kepada kes *Energoprojek (M) Holdings v. PP supra*, dan menekankan bahawa mahkamah perlu melihat kepada tujuan sesuatu perundangan digubal. Tujuan Parlimen menggubal Akta Pemaju Perumahan (Kawalan dan Pelesenan) 1966 ialah untuk melindungi pembeli-pembeli rumah daripada pemaju perumahan. Seksyen 16AD, hujah Peguam Negara, tidak boleh ditafsir sebagai mewujudkan suatu kesalahan bagi kemungkiran perjanjian kerana di bawah seksyen itu yang menjadi kesalahan adalah ketidakpatuhan kepada award tribunal. Kedua-dua

perkara itu, mengikut Peguam Negara adalah tidak berhubungkait. Oleh kerana yang menjadi kesalahan jenayah ialah ketidakpatuhan kepada award dan award itu hanya diberi selepas 1 Disember 2002. Seksyen 16AD, tegas Peguam Negara, adalah berkuatkuasa secara prospektif dan oleh demikian tidaklah bercanggah dengan Perkara 7 Perlembagaan Persekutuan.

Persoalan di hadapan mahkamah ini ialah sama ada tribunal mempunyai bidang kuasa mendengar tuntutan yang timbul daripada perjanjian jualbeli yang dimasuki sebelum tarikh Akta Pindaan berkuatkuasa. Mahkamah ini bersetuju dengan Mahkamah Rayuan bahawa bidang kuasa tribunal adalah sebagaimana diperuntukkan oleh s. 16N(2) yang berbunyi:

> The jurisdiction of the Tribunal shall be limited to a claim that is based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the licensed housing developer which is brought by a homebuyer not later than twelve months from the date of issuance of the certificate of fitness for occupation for the housing accommodation or the expiry date of the defects liability period as set out in the sale and purchase agreement.

Sehubungan ini, mahkamah ini merujuk kepada s. 16N(3) dan s. 16O(1) Akta Pindaan yang masing-masingnya memperuntukkan bahawa:

> 16N (1) ...
>
> (2) ...
>
> (3) Notwithstanding subsection (2) no claim shall be affected or defeated on the ground that no sale and purchase agreement has been entered into between the homebuyer and the licensed housing developer at the time when the cause of action accrues if there exists a previous dealing between the homebuyer and the licensed housing developer in respect of the acquisition of the housing accommodation.
>
> 160 (1) Notwithstanding that the amount or value of the subject-matter claimed or in issue exceeds twenty-five thousand ringgit, the Tribunal shall have jurisdiction to hear and determine the claim if the parties have entered into an agreement in writing that the Tribunal shall have jurisdiction to hear and determine the claim.

Peruntukan-peruntukan di atas menunjukkan bahawa bidang kuasa tribunal ditetapkan secara longgar. Ini pada pendapat mahkamah, menunjukkan hasrat Parlimen untuk menyediakan suatu forum yang mudah bagi pembeli-pembeli rumah membuat tuntutan. Mahkamah ini bersetuju dengan Mahkamah Rayuan bahawa:

> It is absurd in our view to say that Parliament proceeded to legislate for the establishment of the Tribunal well aware that it would only begin to serve its purpose a few years later since it would be inconceivable for claims to arise on breaches of sale and purchase agreements entered into prior to the appointed date. Meanwhile the claims of homebuyers based on breaches of sale and purchase agreements entered into prior to the appointed date would continue to languish under the present set up. Surely that must have been the very mischief which Parliament intended to address when it legislated for the establishment of the Tribunal.

Di dalam kes *Chebaro v. Chebaro* [1986] 2 All ER 897 pihak-pihak telah berkahwin di Beirut, Lebanon dan menetap di United Kingdom. Mereka kemudian berpisah tetapi masih tinggal di England. Pada 16 April 1985, atas permohonan suami, dikri cerai telah diberikan di Lebanon. Selepas s. 12 "Matrimonial and Family Proceedings Act 1984" berkuatkuasa di England pada 16 September 1985, isteri telah memohon kebenaran untuk suatu perintah untuk relif kewangan. Seksyen 12 Akta itu berbunyi:

> Where – (a) a marriage has been dissolved or annulled, or the parties to a marriage have been legally separated, by means of judicial or other proceedings in an overseas country, and (b) the divorce, annulment or legal separation is entitled to be recognized as valid in England and Wales, either party to the marriage may apply to the court in the manner prescribed by rules of court for an order for financial relief under this Part of this Act.

Sheldon J membenarkan permohonan isteri dan di dalam penghakimannya di ms 903 berkata:

> Apart from his reliance in the present case on the general proposition that legislation is not to be regarded as having retrospective operation unless such a construction is unavoidable, counsel for the husband has pointed to the unfair consequences to the husband that might follow in such an event; the creation of new rights and obligations and by the imposition on him of potentially severe financial liability which did not exist when his marriage was dissolved. The possibility of such disadvantages, of course, I accept; indeed, the risk that such consequences will follow forms the basis of the court's dislike of retrospective legislation. That is not to say, however, that such risks are not contemplated or even intended by Parliament when introducing new legislation.

Di ms 904 YA berkata:

> In my judgment ... those words, in their ordinary and natural meaning, apply initially to all cases in which the divorce, annulment or legal separation has been pronounced in judicial or other proceedings overseas, whatever the date of such proceedings and even if it was before 16 September 1985, and accordingly, the provisions in question are retrospective in their effect.

Terhadap keputusan YA Hakim itu, suami merayu kepada Mahkamah Rayuan dan Balcombe LJ di dalam *Chebaro v. Chebaro* [1987] Fam 127 berkata di ms 131:

> ... in my judgment the meaning of the words used is plain and unequivocal. The use of the past tense – "Where ... a marriage has been dissolved" – in contradistinction to the present tense in the following paragraph – and ... the divorce ... is entitled to be recognized" – makes it clear that the section is intended to apply to a decree of divorce, whenever pronounced and whether before or after 16 September 1985 ... Further support for this construction is afforded by the provisions of paragraphs (a) and (b) of section 15(1) of the Act of 1984. These lay down the jurisdictional requirements which have to be satisfied for the court to entertain an application for financial relief under Part III. They are if:
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> > (a) either of the parties to the marriage was domiciled in England and Wales ... on the date on which the divorce, annulment or legal separation obtained in overseas country took effect in that country; or (b) either of the parties was habitually resident in England and Wales throughout the period of one year ending with the date ... on which the divorce, annulment or legal separation obtained in the overseas country took effect in that country; ...
>
> This is language which it is hard to reconcile with a construction that limits the operation of section 12 only to those overseas divorces granted after the date when Part III came into force.

Neill LJ pula berkata di ms 134:

> In my judgment the intention of the legislature can be determined with sufficient certainty by looking at the words of section 12(1) of the Act of 1984 by themselves. It is plain from the concluding words of the subsection that a person can apply to the court for financial relief if the conditions set out in paragraphs (a) and (b) are satisfied. It is also to be observed that this right can be exercised by either party to the marriage.

Jelas daripada ungkapan-ungkapan penghakiman di atas, mahkamah itu mengambil pendekatan bahawa mengikut maksud dan kesan biasa s. 12 itu, soal sama ada sesuatu perkahwinan itu dibubarkan sebelum atau selepas seksyen itu berkuatkuasa tidak penting. Apa yang penting ialah syarat-syarat yang dinyatakan di dalam seksyen itu dipenuhi.

Prinsip yang sama juga dipakai di dalam kes *Hager v. Osborne* [1992] Fam 94. Di dalam kes itu, pemohon telah pada 5 Julai 1990 memohon, di bawah s. 11B "Guardianship of Minors Act 1971" yang berkuatkuasa pada 1 April 1989, peruntukan kewangan bagi anaknya yang dilahirkan pada 23 December

1983. Responden menafikan dirinya ayah kepada anak itu dan memohon membatalkan tuntutan pemohon atas alasan, antara lainnya, bahawa s. 11B itu tidak berkuatkuasa kebelakangan. Seksyen 11B itu berbunyi:

> The court may, on the application of either parent of a child, make – (a) in the case of proceedings in the High Court or a county court, one or more of the orders mentioned in subsection (2) of this section; ... (2) The orders referred to in subsection (1) of this section are – (a) an order requiring one parent to make to the other parent for the benefit of the child, or to the child, such periodical payments, and for such term as may be specified in the order; ... (c) an order requiring one parent to pay to the other parent for the benefit of the child, or to the child, such lump sum as may be so specified; (d) an order requiring either parent to transfer to the other parent for the benefit of the child, or to the child such property as may be so specified, being property to which the first-mentioned parent is entitled, either in possession or reversion; (e) an order requiring that a settlement of such a property as may be so specified, being property to which either parent is so entitled, be made to the satisfaction of the court for the benefit of the child.

Merujuk kepada penghujahan peguam responden YA Hakim berkata di ms 99:

> Mr. Turner ... submits, and there is attraction to this submission, that by section 2 of the Affiliation Proceedings Act 1957, three years having elapsed since the child's birth without the respondent having paid money for the child's maintenance, the respondent had acquired the right pursuant to section 2 of the Affiliation Proceedings Act 1957 not to be sued for maintenance thereafter, and accordingly, that accrued right should not be taken away from him retrospectively.

Seksyen 2 "Affiliation Proceedings Act 1957" memperuntukkan masa bagi membuat aduan mengenai "paternity" seperti berikut:

> (a) at any time within three years from the child's birth, or, (b) at any subsequent time, upon proof that the man alleged to be the father of the child has within the three years next after the birth paid money for its maintenance ...

Berhubung peruntukan ini YA Hakim berkata:

> It is common ground that the respondent made no such payment for the boy's maintenance, and consequently the mother would not have been entitled to seek an order for such maintenance after 23 December 1986. That date passed without any further proceedings being launched and the respondent was thus entitled to feel that he was no longer at risk of being required to maintain his child.

YA Hakim bagaimanapun menolak permohonan responden untuk membatalkan tindakan pemohon dengan menyatakan demikian di ms 101:

> In my judgment, the natural and ordinary meaning of section 11B of the Act 1971, taken in isolation and taken in the context of the other provisions I have referred to, leads inevitably to the conclusion that no rule or presumption against retrospectivity operates so as to prevent the claim being made on the facts such as those before me.

Demikian juga dengan rayuan di hadapan mahkamah ini. Berasaskan ungkapan-ungkapan penghakiman di atas, mahkamah ini bersetuju dengan Mahkamah Rayuan bahawa mengikut s. 16N(2), asalkan tuntutan di hadapan tribunal itu melibatkan perjanjian jualbeli di antara pembeli rumah dan pemaju perumahan berlesen dan tuntutan dibuat dalam masa tidak melebihi 12 bulan daripada tarikh pengeluaran sijil penghunian atau tarikh luput tempoh liabiliti kecacatan seperti dinyatakan di dalam perjanjian jualbeli, maka tribunal mempunyai bidang kuasa untuk mendengar tuntutan tersebut tanpa mengira tarikh perjanjian. Tafsiran ini, pada pendapat mahkamah ini, diperkuatkan oleh s. 16N(3) yang memperuntukkan bahawa sesuatu tuntutan tidak akan dijejaskan atau digagalkan atas alasan tiada perjanjian jualbeli wujud di antara pembeli rumah dan pemaju perumahan berlesen pada masa kausa tindakan akru jika terdapat suatu urusan terdahulu antara pihak-pihak itu mengenai pemerolehan penghunian rumah. Justeru pada pendapat mahkamah ini, tarikh perjanjian bukanlah perkara yang material bagi membolehkan tribunal mendengar tuntutan pembeli rumah itu.

Dari suatu sudut yang lain, wajar diingat bahawa Akta Pindaan memperuntukkan perubahan forum daripada mahkamah kepada tribunal. Ketara ini adalah perkara berkaitan prosedur dan bukannya substantif. Oleh yang demikian ianya adalah berkuatkuasa kebelakangan. Prinsip ini telah ditegaskan di dalam kes-kes *Ramzan Darzi and Others v. Mst Azizi and Others* [1976] Cri LJ 897 dan *New India Insurance Co. Ltd v. Shanti Misra* AIR [1976] SC 237. Di dalam kes *Ramzan Darzi,* Jaswant Singh CJ di dalam penghakiman majoriti berkata di ms 898 dan 899:

> The point that therefore remains for consideration is whether the choice of forum relates to the realm of procedure or not. That the choice of forum is a matter of procedure and is not a matter of substantive right and in most cases a new Act would have a retrospective effect so far as the choice of forum is concerned appears to be well settled. Reference in this connection may be made to a decision of the Allahabad High Court in *Hazari Tewari v. Mt. Maktula,* AIR [1932] All 30, where Sulaiman, Ag. CJ while interpreting the new Tenancy Act which conferred jurisdiction on the revenue court and barred the jurisdiction of the civil court in the matter of a suit in respect of which adequate relief could be obtained by way of a revenue suit observed as follows:

> The choice of forum is a matter of procedure and not a substantive right, and in most cases a new Act would have a retrospective effect so far as the choice of forum is concerned.

To the same effect is a decision of the Madras High Court in *VC K Bus Service v. HB Sethna* AIR [1965] Mad 149 where it was held as follows:

> No litigant has or can have, vested right in a particular forum. He cannot say as a matter of right that his suit or application should be tried by this or that forum which existed on the date his cause of action arose. Forum belongs to the realm of procedure and does not constitute substantive right of a party or a litigant. It should also be borne in mind that cause of action is not to be confused with a forum, and a cause of action, whatever vested rights it may carry with it, does not include a right to insist upon a particular court or Tribunal or Judge or any other. It follows, therefore, that any statutory law which changes a forum, may not raise a question of retrospective operation, unless, of course in exceptional cases, it is inseparably intertwined with vested rights.

Di dalam kes *New India Insurance Co. Ltd. v. Shanti Misra, supra*, Untwalia J menyatakan demikian di ms 240:

> On the plain language of Sections 110A and 110F there should be no difficulty in taking the view that the change in law was merely a change of forum ie, a change of adjectival or procedural law and not of substantive law. It is a well-established proposition that such a change of law operates retrospectively and the person has to go to the new forum even if his cause of action or right of action accrued prior to the change of forum. He will have a vested right of action but not a vested right of forum. If by express words the new forum is made available only to causes of action arising after the creation of the forum, then the retrospective operation of the law is taken away. Otherwise the general rule is to make it retrospective. The expressions "arising out of an accident" occurring in sub-section (1) and "over the area in which the accident occurred", mentioned in sub-s. (2) clearly show that the change of forum was meant to be operative retrospectively irrespective of the fact as to when the accident occurred.

Hujahan pihak perayu bahawa hak-hak substantifnya adalah terjejas dan Perkara 7(1) Perlembagaan Persekutuan dicabuli adalah pada pendapat mahkamah ini tidak berasas. Perkara 7 berbunyi:

> No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

Seksyen 16AD pula memperuntukkan seperti berikut:

> (1) Any person who fails to comply with an award made by the Tribunal within the period specified therein commits an offence and shall on conviction be liable to a fine not exceeding five thousand ringgit or to imprisonment for a term not exceeding two years or to both.
>
> (2) In the case of a continuing offence, the offender shall, in addition to the penalties under subsection (1), be liable to a fine not exceeding one thousand ringgit for each day or part of a day during which the offence continues after conviction.

Mahkamah ini bersetuju bahawa s. 16AD memperuntukkan liabiliti baru ke atas pemaju dan pembeli rumah jika mereka gagal mematuhi award tribunal. Tetapi liabiliti ini adalah berkuatkuasa secara prospektif. Justeru itu seksyen itu tidak melanggar Perkara 7 Perlembagaan Persekutuan. Walaubagaimana pun, kemungkiran perjanjian bukanlah suatu kesalahan jenayah di bawah seksyen itu. Yang menjadi kesalahan jenayah ialah ketidakpatuhan kepada award tribunal dan ianya tidak dalam apa-apa keadaan pun boleh berkuatkuasa kebelakangan kerana tribunal hanya dapat memberi award selepas 1 Disember 2002. Pada pendapat mahkamah ini s. 16AD adalah tidak relevan kepada bidang kuasa tribunal.

Kami dengan itu telah sebulat suara memutuskan bahawa tribunal mempunyai bidang kuasa untuk mendengar tuntutan yang timbul daripada perjanjian yang dimasuki sebelum 1 Disember 2002 dan s. 16AD adalah juga terpakai kepada perjanjian yang dimasuki sebelum tarikh tersebut. Justeru itu rayuan perayu telah ditolak.